Teh Guan Teik v Inspector General of Police & Anor

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-3 OF 1997(N)
LAMIN PCA, PEH SWEE CHIN AND ZAKARIA YATIM FCJJ
20 MAY 1998

Civil Procedure *— Declaration — Application for declaration that dismissal of police officer by disciplinary body was without any reasonable cause or excuse and without any lawful justification or fair play — Whether decision of disciplinary body could be challenged by way of certiorari and not declaration — Whether declaration and certiorari are mutually exclusive remedies*

The appellant was a police sergeant, who filed a writ action in the High Court for, inter alia, a declaration that the termination of the appellant's employment was without any reasonable cause or excuse and without any lawful justification or fair play, and reinstatement. The High Court allowed the application. On appeal to the Court of Appeal, the Inspector General of Police and the Government of Malaysia ('the respondents') raised a preliminary objection that the wrong procedure was adopted by the appellant in filing an action for declarations instead of certiorari. The Court of Appeal allowed the appeal based on the preliminary objection without hearing it on merits. The Federal Court granted leave to appeal. The issue was: 'what is the correct procedure for a police officer dismissed by a disciplinary body to challenge the decision, ie whether by way of declaration or certiorari or either'.

Held, allowing the appeal, setting aside the order of the Court of Appeal and restoring the High Court's order:

(1) (Per **Lamin PCA**) In the instant appeal, the Court of Appeal was out of place to reverse the decision of the court below without considering the merits on the strength of the declaration applied for. The Court of Appeal ought to have considered whether the learned judge below had made a correct finding that the dismissal 'was without reasonable cause or excuse' or 'without lawful justification or fair play' and that declaration could issue (see pp 143I and 144A–B).

(2) (Per **Peh Swee Chin FCJ**) The entrenched principle that declaration and certiorari are not mutually exclusive and are concurrent remedies was asserted several times in the United Kingdom and followed by our courts. First and foremost, O 15 r 16 of the Rules of the High Court 1980 provides for a right to sue by declaration, and as if to exalt such right, it says it shall not be open to objection even if no consequential relief is sought. To dislodge such a remedy by declaration from its entrenched position would require clear and strong words from a statute (see pp 147F and 148D, H); *Government of the Federation of Malaya v Surinder Singh Kanda* [1962] MLJ 169; *Sungai Wangi Estate v*

Uni [1975] 1 MLJ 136 and *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 followed.

Obiter:

(1) (Per **Peh Swee Chin FCJ**) In the instant case, the appellant claimed that the termination of his employment was without fair play. He did not say that the termination of employment was 'invalid' or 'void' or the words 'the dismissal from service' instead of 'termination of employment', the last-mentioned words having been used by him. Yet, fair play is synonymous with fairness. Fairness has been used by the courts in a number of cases as meaning natural justice, though the express use of the words 'natural justice' would be preferred so that one could fall back undoubtedly on the function to ascertain if there is substantial compliance with the twin rules of natural justice.

Thus, the words 'absence of fair play' used in connection with the termination of service were a sufficient invitation to the court for judicial review, quite apart from the traditional prayers that 'he is still a police officer' or that 'he be reinstated' in a writ action by a public officer categorized under art 132 of the Federal Constitution (see p 146F–H).

(2) (Per **Peh Swee Chin FCJ**) A declaration is a very efficient remedy for an aggrieved citizen against ultra vires actions of all public authorities or governmental bodies. If the private citizen was not to be allowed to circumvent the limitations of time for applying, etc of the certiorari by claiming for declaration instead, it would not be difficult to imagine how many such citizens could be, due to lack of expertise in the law of certiorari, barred from seeking justice and the court would have failed to live up to the image the public has, of being an institution of the people to serve the people in the interest of justice (see p 150B–D).

[Bahasa Malaysia summary

Perayu adalah seorang sarjan polis, yang telah memfailkan satu tindakan writ di Mahkamah Tinggi untuk, antara lain, satu perisytiharan bahawa penamatan pekerjaan perayu adalah tanpa sebarang sebab atau alasan yang munasabah dan tanpa sebarang justifikasi yang sah di sisi undang-undang atau keadilan, dan pengembalian kedudukan jawatan. Mahkamah Tinggi telah membenarkan permohonan tersebut. Atas rayuan kepada Mahkamah Rayuan, Ketua Polis Negara dan Kerajaan Malaysia ('penentang-penentang') telah membangkitkan bantahan awal bahawa prosedur yang salah telah diterima-pakai oleh perayu dalam memfailkan satu tindakan untuk perisytiharan dan bukannya certiorari. Mahkamah Rayuan telah membenarkan rayuan berdasarkan bantahan awal tanpa mendengarnya berdasarkan merit. Mahkamah Persekutuan telah memberikan kebenaran untuk merayu. Isunya adalah: 'apakah

A prosedur betul bagi seorang pegawai polis yang diberhentikan oleh badan tatatertib untuk mencabar keputusan itu, iaitu sama ada melalui perisytiharan atau certiorari atau mana-mana satu'.

Diputuskan, membenarkan rayuan tersebut, mengetepikan perintah B Mahkamah Rayuan dan mengembalikan perintah Mahkamah Tinggi:

(1) (Oleh **Lamin PMR**) Dalam rayuan semasa ini, Mahkamah Rayuan telah silap dalam mengakaskan keputusan mahkamah di bawah tanpa mempertimbangkan merit berdasarkan perisytiharan yang dipohon. Mahkamah Rayuan sepatutnya mempertimbangkan sama ada hakim yang arif di bawah telah membuat keputusan C yang betul bahawa pemecatan tersebut 'adalah tanpa sebab atau alasan yang munasabah' atau 'tanpa justifikasi yang sah di sisi undang-undang atau keadilan' dan bahawa perisytiharan boleh dikeluarkan (lihat ms 143I dan 144A–B).

(2) (Oleh **Peh Swee Chin HMP**) Prinsip yang kukuh bahawa D perisytiharan dan certiorari tidak eksklusif secara bersaling dan bersama-sama merupakan remedi, telah ditegaskan beberapa kali di United Kingdom dan diikut oleh mahkamah-mahkamah kita. Yang paling pentingnya, A 15 k 16 Kaedah-Kaedah Mahkamah Tinggi 1980 memperuntukkan hak untuk mendakwa melalui perisytiharan, dan seolah-olah untuk memberi penekanan kepada E hak itu, ia menyatakan bahawa adalah tidak terbuka kepada bantahan meskipun tiada relief berbangkit dipohon. Untuk menyingkirkan remedi yang sedemikian melalui perisytiharan daripada kedudukannya yang kukuh akan memerlukan perkataan-perkataan yang jelas dan tegas daripada sesuatu statut (lihat F ms 147F dan 148D, H); *Government of the Federation of Malaya v Surinder Singh Kanda* [1962] MLJ 169; *Sungai Wangi Estate v Uni* [1975] 1 MLJ 136 dan *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 diikut.

G **Obiter**:

(1) (Oleh **Peh Swee Chin HMP**) Dalam kes semasa, perayu menuntut bahawa penamatan pekerjaannya adalah tidak adil. Beliau tidak menyatakan bahawa penamatan pekerjaan adalah 'tak sah' atau 'batal' atau perkataan-perkataan 'pemecatan daripada H perkhidmatan' dan bukannya 'penamatan pekerjaan', perkataan-perkataan yang terakhir disebutkan yang telah digunakan oleh beliau. Namun begitu, keadilan adalah sama dengan adil. Keadilan telah digunakan oleh mahkamah-mahkamah dalam sebilangan kes sebagai bermaksud keadilan asasi, walaupun penggunaan nyata perkataan-perkataan 'keadilan asasi' lebih diutamakan supaya I seseorang boleh bersandar tanpa ragu-ragu di atas fungsi tersebut bagi menentukan jika terdapatnya pematuhan substansial akan kaedah-kaedah berkembar keadilan asasi.

Justeru itu, perkataan-perkataan 'ketiadaan keadilan' yang digunakan sehubungan dengan penamatan perkhidmatan merupakan pelawaan yang memadai kepada mahkamah untuk kajian kehakiman, selain daripada pohonan tradisional bahawa 'beliau masih merupakan seorang pegawai polis' atau bahawa 'beliau hendaklah ditempatkan semula' dalam satu tindakan writ oleh seorang pegawai awam yang dikategorikan di bawah perkara 132 Perlembagaan Persekutuan (lihat ms 146F–H).

(2) (Oleh **Peh Swee Chin HMP**) Perisytiharan merupakan remedi yang paling cekap bagi seorang warganegara yang terkilan terhadap tindakan ultra vires kesemua pihak berkuasa awam atau badan-badan kerajaan. Jika warganegara persendirian tersebut tidak dibenarkan memintasi had masa untuk memohon, dan sebagainya berhubung certiorari dengan menuntut untuk mendapatkan perisytiharan sebaliknya, bukanlah sukar untuk membayangkan betapa banyak warganegara yang sedemikian boleh, disebabkan oleh ketiadaan kemahiran dalam undang-undang certiorari, dihalang daripada cuba mendapatkan keadilan dan mahkamah mungkin gagal untuk mencapai imej yang dipandang oleh orang-orang awam, iaitu sebagai sebuah institusi orang awam untuk orang awam demi keadilan (lihat ms 150B–D).]

Notes

For cases on declaration, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1497–1536.

Cases referred to

Barnard & Ors v National Dock Labour Board [1953] 2 WLR 995 (refd)
Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101 (folld)
Davis v Galmoye (1888) 39 Ch D 322 (refd)
Dyson v Attorney General [1911] 1 KB 410 (refd)
Government of the Federation of Malaya v Surinder Singh Kanda [1962] MLJ 169 (folld)
Healey v Minister of Health [1954] 3 WLR 222 (HC); [1954] 3 WLR 815, also in [1955] 1 QB 221 (CA) (refd)
Mahan Singh v Government of Malaysia [1978] 2 MLJ 133 (refd)
Mohamed Nordin b Johan v Attorney General Malaysia [1983] 1 MLJ 68 (refd)
Mohd bin Ahmad v Yang Di-Pertua, Majlis Daerah Jempol [1993] 3 AMR 2129 (refd)
O'Reilly v Mackman [1982] 3 All ER 1124 (refd)
Pyx Granite Co Ltd v Ministry of Housing and Local Government [1960] AC 260 (refd)
Ridge v Baldwin [1963] 2 All ER 66 (refd)
Sri Lempah Enterprise Sdn Bhd v Pengarah Tanah and Galian Wilayah Persekutuan [1979] 1 MLJ 153 (refd)

Sugumar Balakrisnan v Chief Minister of the State of Sabah & Anor [1989] 1 MLJ 233 (refd)
Sungai Wangi Estate v Uni [1975] 1 MLJ 136 (folld)
Vine v National Dock Labour Board [1957] 2 WLR 106 (refd)

Legislation referred to

Federal Constitution art 135(1), (2)
Rules of the High Court 1980 O 15 r 16, O 53
Rules of the Supreme Court O 53 [UK]
Specific Relief Act 1950
Town and Country Planning Act 1947 s 17 [UK]

Appeal from: Civil Appeal No N–01–7 of 1994 (Court of Appeal, Kuala Lumpur)

Karpal Singh (*Christopher Fernando, Maniam Rao* and *Gobind Singh Deo* with him) (*Aris Rizal Christopher Fernando & Co*) for the appellant.
Abu Bakar Jais (Senior Federal Counsel) for the respondents.

Lamin PCA: On 20 January 1998, we sat to hear the instant appeal to decide the following question: 'What is the correct procedure for a police officer dismissed by a disciplinary body to challenge the decision, ie whether by way of declaration or certiorari or either.'

The short answer is, in the opinion of the Privy Council in *Government of the Federation of Malaya v Surinder Singh Kanda* [1962] MLJ 169 (at p 173I) expressed by Lord Denning, thus:

> ... Their Lordships notice that, before Rigby J, it was suggested that the only remedy was by certiorari. But their Lordships agree with him that the remedy by declaration is available also.

In that case, the Privy Council had to decide the question of dismissal of a police inspector which calls for the interpretation of art 135(1) of the Federal Constitution. In the case of *Mahan Singh v Government of Malaysia* [1978] 2 MLJ 133, again the Privy Council had to decide the fate of another employee in the service of the Federal Government holding the post of senior registrar of the sessions court. He was 'pensioned off in the public interest' and he had not reached the compulsory retirement age of 55. On the facts of the case, the relevant question was whether it was a dismissal and if so whether he had been given 'a reasonable opportunity of being heard' within the meaning of art 135(2) of the Federal Constitution. To examine whether this rule of natural justice has been complied with, a declaration was applied for. The High Court granted the declaration for the reason that the termination of the services of Mahan Singh had breached art 135(2) and therefore void. The Federal Court disagreed and on appeal to the Privy Council, the Council favoured the decision of the High Court. In *Sungai Wangi Estate v Uni* [1975] 1 MLJ 136, an employee of the estate was dismissed by giving him one month's salary in lieu of notice. The matter was referred to the Industrial Court which decided that there was condonation by the applicant/employer. The applicant applied

by originating summons for a declaration that there was an error on the face of the record of the Industrial Court. The court refused to grant the declaration as there was only 'mere error of law on the face of the record' which did not result in any jurisdictional defect. The learned judge was of the view that the correct and appropriate procedure in such a case was to apply for an order of certiorari to quash the award. Eusoffe Abdoolcader J (as he then was) said (at p 137G):

> ... Certiorari will lie to quash a decision for want or excess of jurisdiction, breach of the rules of natural justice, error of law on the face of the record and fraud or collusion. There is now ample authority demonstrating that a declaration of invalidity is obtainable for jurisdictional defects and breaches of natural justice, in such cases as, for example, where an interested party has not been joined or heard, resulting in a decision or determination being a nullity (*Ridge v Baldwin* [1964] AC 40). The position however seems to be somewhat different where the only defect is an error of law on the face of the record not going to jurisdiction. Such a decision is voidable and not void and logically a voidable decision cannot be declared invalid, as such a declaration will not state that the decision never had any effect but rather that it is ineffective as from the date of the declaration.

The opinion of the Privy Council in *Surinder Singh Kanda* was not cited before his Lordship. It was not done perhaps for the reason that in *Surinder*, it involves a person in the service of the government which to my mind should not be viewed with a difference since observations on certiorari and declaration being concurrent remedies were made. The learned judge made a further distinction thus (at p 139E):

> ... In other words, the court can grant a declaration only where a decision which has been impugned is without jurisdiction and void, but not where it is within jurisdiction and merely voidable.

The learned judge continued:

> It would therefore appear to me to be clear on the authorities which I have discussed and notwithstanding the equivocal decision in *Taylor v National Assistance Board* [1956] P 470 that I am precluded from making the declaration sought for mere error of law on the face of the record which does not result in any jurisdictional defect so as to make the award of the Industrial Court a nullity. The correct and appropriate procedure would in the circumstances have been an application for an order of certiorari to quash the award, and in my view certiorari would indeed have been the only remedy available to the applicant.

In the case of *Mohamed Nordin bin Johan v Attorney General Malaysia* [1983] 1 MLJ 68 — where the Federal Court was not dealing with the problem of termination of employment or dismissal but with the propriety of the issuance of the two certificates by the Attorney General on an application for an order of certiorari to have them quashed — Raja Azlan Shah Ag LP (as he then was) said (at p 69):

> We think that in the circumstances of this case certiorari is the appropriate remedy to be sought and not a declaration, and we need only refer to the judgment of Abdoolcader J in *Sungai Wangi Estate v Uni* [1975] 1 MLJ 136 ... .

A Going through the authorities, it does not appear to me to be without difficulty to decide when the application of certiorari is more appropriate and when it is not. Perhaps an amendment to the rules of court and the Specific Relief Act 1950 may assist to resolve some of the problems in this area to avoid injustice caused to both employees and employers. For the moment, I concur with my learned brother Peh Swee Chin FCJ.

B However, the Court of Appeal in the instant appeal before us made short work of the case before it with its swift pronouncement to the effect that as the officer (the appellant before us) had adopted the wrong procedure (ie by applying for a declaration and not for an order of certiorari), and the court decided purely as a preliminary issue that the appeal must be allowed C (without considering the merits of the appeal). The reason for so doing, in its view, was that a declaration would not be capable of quashing the decision of the inferior tribunal and only certiorari would be capable of doing so. The court said with respect that if the declaration was allowed to stand, the decision of the tribunal would remain as it had not been D quashed. Then it said that there would be two 'inconsistent decisions, one by the inferior tribunal and the other by the court'. In this case, there was no way for the appellant to apply for certiorari. He must first apply for leave which can only be done within six weeks from the date of his dismissal. He was late by 13 months.

E I am however tempted to observe one other point arising out of this case and that is on the question of whether an appellate court should entertain a preliminary objection or issue brought before it for the first time. Before the High Court, of course the appellant did not apply for an order of certiorari perhaps because he was out of time but filed a writ praying for a declaration instead. That was not objected to by the senior F federal counsel. He only did it before the Court of Appeal as a preliminary issue. In the case of *Davis v Galmoye* (1888) 39 Ch D 322, the plaintiffs took out a summons against the defendant for leave to issue a writ of attachment for his contempt in not having complied with an order of 11 December 1886. Mr Justice North, in chambers, made the order as applied for by the summons. No objection was made to the exercise of the G court's jurisdiction in chambers. On appeal before the Court of Appeal, an objection was taken in that the leave to issue the writ of attachment ought not to have been given in chambers as an order to commit to prison has always been made to a judge in open court. Cotton LJ (sitting with Fry LJ) said (at p 323): 'that as the objection had not been raised before Mr Justice H North, the defendant was not entitled to raise it on appeal'. But, he continued, as the point had been argued, he thought it right to state his opinion that the application for leave to issue a writ of attachment ought to have been made by motion in open court, and not by summons. The appeal was dismissed as the court found that on the merits there was no ground for interfering with the discretion exercised by Mr Justice North. I In the instant appeal before us, as we favour the proposition that declaration and certiorari are concurrent remedies, all the more so I am of the view, with respect, the Court of Appeal was utterly out of place to reverse the decision of the court below without considering the merits on the strength of the declaration applied for. The court could have considered whether

the dismissal 'was without reasonable cause or excuse' or 'without lawful justification or fair play' in the light of the three charges having been preferred and finding made after a trial in the orderly room proceeding. Before the High Court, witnesses were called including the Pengadil (SB1) of the orderly room proceeding. The Court of Appeal ought to have considered whether the learned judge below had made a correct finding that the dismissal 'was without reasonable cause or excuse' or 'without lawful justification or fair play' and that declaration could issue.

Our function in the present appeal is limited to within the confines of the question as formulated for the purpose of the leave as granted and not in the nature of a rehearing of the whole case and therefore I am constrained to even suggest the proper outcome of this case on the evidence available before the High Court.

As regards the conclusion of this appeal, I would go along with my learned brother Peh Swee Chin FCJ in that I would allow the appeal and on the same terms.

Peh Swee Chin FCJ: This appeal concerns a public officer, viz a police sergeant, who filed a writ action in the High Court for, inter alia, the following prayers:

(i) A declaration that the termination of the plaintiff's employment to be without any reasonable cause or excuse and without any lawful justification or fair play;

(ii) A declaration that the plaintiff is still a police officer holding the rank of a sergeant of the defendants without any loss in remuneration, seniority and other pecuniary rights afforded to him in law;

(iii) Reinstatement to his former portion in the police force without loss of any benefits, monetary or otherwise or whatsoever;

and costs.

The High Court, at the end of a hearing, made the order in terms of the specific prayers of the police sergeant set out above. The plaintiff there, ie the police sergeant, is hereafter called 'the police sergeant'.

On appeal to the Court of Appeal by the Inspector General of Police and Kerajaan Malaysia, the appeal was allowed and the order of the High Court was set aside purely on a procedural point, agreed as a preliminary issue or objection which was to the effect that the wrong procedure was adopted by the police sergeant in filing an action for declarations that the termination of his employment from the police force was without 'lawful justification or fair play', that he was still 'a police officer' and for 'reinstatement'.

The preliminary objection was upheld and that the appeal was allowed without the Court of Appeal hearing it on merits. To quote, the lower court said: '... we are inclined to hold that the respondent's action herein is nothing more than an appeal from a decision of the inferior tribunal in the guise of a writ for a declaratory judgment ... . It must be clear that the High Court has no jurisdiction to substitute its own opinion or question of fact from that of the inferior tribunal nor is it at liberty to act as an

A appellate court against the inferior tribunal on question of facts.' The lower court seems to have solely relied on only one reported case for its decision, ie *Healey v Minister of Health* [1954] 3 WLR 222 (HC); [1954] 3 WLR 815, also in [1955] 1 QB 221 (CA).

The police sergeant applied to the Federal Court for leave to appeal B against the decision of the Court of Appeal and leave was granted but limited to one issue, viz as to 'what is the correct procedure for a police officer dismissed by a disciplinary body to challenge the decision, ie whether by way of declaration or certiorari or either'. Thus, the matter has come to us.

C To revert to the case of *Healey* as relied on solely by the Court of Appeal, a shoemaker was employed by a hospital management committee in the shoemaker's shop of a mental hospital, the said shop having provided occupational therapy for the patients. The plaintiff, ie the shoemaker, claimed from the Minister (for more favourable terms of superannuation) for a declaration that he was a mental health officer within the meaning of D the words in the National Health Service (Superannuation) Regulations 1950. The Minister, by a letter, informed him that he was not such an officer. He filed an action for the declaration in High Court against the Minister that he was such a mental health officer. The Minister replied in court that the High Court had no jurisdiction and that the statement of claim disclosed no cause of action.

E The High Court in the cited case held, in refusing the claim for the declaration, that the plaintiff's claim that he was a mental health officer within the definition of a 'mental health officer' under the said legislature was in effect an appeal from the determination of the Minister, and such appeal was not provided by the said regulations. The learned judge said at F p 226 to the effect, with regard to the said decision of the Minister and also to the defence of the Minister in the High Court, that the plaintiff's claim had disclosed no cause of action:

> He has determined that the plaintiff is not a mental health officer within the meaning of those regulations. Can that determination be reviewed by a G court of law? It is to be noted that the statement of claim does not allege that the defendant had no jurisdiction to do what he did, or that he acted ultra vires, or that he misconstrued the Act and the regulation, or that he acted contrary to the principles of natural justice, or that he was biased, or that there was error of law on the face of the decision. In effect, the plaintiff wants to contend in the action that the defendant determined wrongly, and H he want the court to declare accordingly, or it may be said that the plaintiff is appealing against the determination of the defendant, notwithstanding that no appeal is provided for either in the Act or in the regulations.

It will have been observed that the statement of claim in that cited case was so narrowly drafted as to preclude the High Court from judicially reviewing I the decision of the Minister.

The Court of Appeal in England dismissed the appeal, the headnote of the Weekly Law Reports for this case is very illuminating and pithily accurate and it is reproduced in full below:

Held, that, the plaintiff by his pleading not having asked for a declaration that the Minister's determination was invalid or asserted that the determination of the Minister was wrong in law or that the Minister lacked jurisdiction, but having invited the court. to assume an appellate jurisdiction, which it had not been given and could not create, the appeal must be dismissed.

Lord Denning in that case said: 'At one stage in the argument, Mr O'Connor sought leave to amend and claim a declaration that the Minister's decision was void, but he had to concede that it was too late to amend now for the purposes of the preliminary issue.'

I have highlighted the above portions which indicate the eye of the storm amidst much argument and citation of cases and it should be obvious to anyone that in so far as the plaintiff in that cited case sought in fact for the court's judicial review of the decision of the Minister of Health, the pleading was defective as it was far too nebulous for the learned judge to step in boldly on or for a judicial review and I venture to suggest, especially when 'justice' of the case, had not been in any sense overwhelming for the plaintiff there. Conceivably inter alia, a 'mechanic' for making dentures in a hospital in a similar and hypothetical situation could not, with much hope of success claim to be a dental officer of the hospital. Conceivably also, the Court of Appeal in England seems to have held that an ordinary action when not stated as an invitation to the court for judicial review, either expressly or by necessary implication, cannot be converted into a proceeding for judicial review.

In the instant case, the police sergeant claimed that the termination of his employment was without fair play, inter alia. He did not say that the termination of employment was 'invalid' or 'void' or the words 'the dismissal from service' instead of 'termination of employment', the last-mentioned words having been used by him. Yet, fair play is synonymous with fairness. Fairness has been used by the courts in a number of cases as meaning natural justice, though I prefer personally the express use of the words 'natural justice' so that one could fall back undoubtedly on the function to ascertain if there is substantial compliance with the twin rules of natural justice.

Thus, the words 'absence of fair play' used in connection with the termination of service, in my view, are a sufficient invitation to the court for judicial review, quite apart from the traditional prayers that 'he is still a police officer' or that 'he be reinstated' in a writ action by a public officer categorized under art 132 of the Federal Constitution; see *Mohd bin Ahmad v Yang Di-Pertua, Majlis Daerah Jempol* [1993] 3 AMR 2129. I have dealt with this at some length to show that the words 'without fair play' would attract judicial review though there is no use of the word 'invalid' as mentioned by Lord Denning in the statement of claim in the instant case (*Healey*).

The hearing in the High Court in this instant case was conducted expressly on the basis of a judicial review with no objection from anybody that the basis had been wrong or otherwise improper. Please see the notes of evidence and proceedings at p 49 of the appeal record.

A In the instant case, the preliminary issue about the High Court having no jurisdiction to enter the claim by a writ of action for those declarations aforesaid (instead of applying the 'correct' procedure for order of certiorari) was raised for the first time in the Court of Appeal and of course, we accept that the plea could be raised on appeal for the first time because it related to jurisdiction.

B Before us, learned counsel for the Inspector-General of Police persisted with the line of argument based on the ratio of the Court of Appeal in the instant case, ie that the correct procedure should have been an application for order of certiorari as provided under O 53 of the Rules of High Court 1980 ('the RHC'). No authority was cited by him. Learned counsel for the C police sergeant on the other hand, relied on the well known cases of *Surinder Singh Kanda v Government of Federation of Malaya* [1962] MLJ 169, being a Privy Council appeal from the then Malaya in which Lord Denning held, in an action for declaration that the dismissal of a police inspector was void, and the Privy Council agreed with the view of the High D Court in that case that the remedy by way of declaration, was also available to the inspector as well as the remedy by certiorari. Lord Denning was delivering the opinion of the Board. Learned counsel for the police sergeant also relied on *Sugumar Balakrisnan v Chief Minister of the State of Sabah & Anor* [1989] 1 MLJ 233 in which it was held that the fact that the remedy of certiorari was available to the plaintiff then could not debar him from E claiming the remedy of declaration and both were concurrent remedies.

Was the Court of Appeal correct in holding the way it did as stated above, ie that the procedure by way of declaration was wrong and that the correct way was by way of certiorari?

F With very great respect, the view of the Court of Appeal is totally against the weight of authorities and established principles.

First and foremost, O 15 r 16 of the RHC says:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of rights whether or not consequential relief G is or could be claimed.

Order 15 r 16 is statutory authority for a right to sue by declaration, and as if to exalt such right, it says it shall not be open to objection even if no consequential relief is sought.

H On this O 15 r 16, Abdoolcader J (as he then was) in *Sungai Wangi Estate v Uni* [1975] 1 MLJ 136 stated that the rule 'has the widest application .... It does not prescribe any procedure nor is it limited to any specific matter. It applies to all proceedings for declaration ... when no special procedure is laid down, the claim for a declaratory judgment is brought by way of a writ.'

I Lee Hun Hoe CJ (Borneo) in *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 said: 'The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion.'

This rule or its predecessor by a different numerical nomenclature appears to have been brought into the justice system in the last century in the United Kingdom to provide another private law remedy (private law being concerned with the laws of contract and tort and the like). This private law remedy was adopted by the courts as a public law remedy for judicial review (public law being concerned with rights and liabilities of various organs of the government against a private citizen). Such an adopted public law remedy has not only become very popular but has been entrenched strongly in our law. It is so entrenched that a provision of another statutory remedy for a claimant is no bar to an action by the same claimant for a declaration, per Raja Azlan Shah CJ (Malaya) (as he was then) in *Sri Lempah Enterprise Sdn Bhd v Pengarah Tanah and Galian Wilayah Persekutuan* [1979] 1 MLJ 153 at p 148. Declaration, like all other remedies of judicial review is of course, a discretionary remedy.

To dislodge such a remedy by declaration from its entrenched position would require clear and strong words from a statute. Thus, some dictum in this connection bears repetition; it says: 'It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words.' This was made by Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 at p 286 who described the principle as a 'fundamental rule from which would not for my part, sanction any departure.'

Lord Denning in *Surinder Singh Kanda* in the Privy Council also agreed with the trial judge below and referred to the effect that both remedies of certiorari and declaration were available concurrently. In that case, in which a police inspector claimed for a declaration that his dismissal was void, the Privy Council allowed his appeal and granted the said declaration.

Any random check of our law reports for practically every year since *Surinder Singh Kanda* and *Ridge v Baldwin* [1963] 2 All ER 66 will reveal cases of government servants seeking declarations that their dismissals were void in which no shadow of doubt has been cast on the propriety of seeking such a declaration instead of a certiorari. It will be unnnecessary to cite them one by one.

The entrenched principle that declaration and certiorari are not mutually exclusive and are concurrent remedies was asserted several times in the United Kingdom and followed by our courts.

The first is *Barnard & Ors v National Dock Labour Board* [1953] 2 WLR 995. A port manager was alleged and found to have no authority to suspend the registered port workers/plaintiffs from work and pay. The plaintiffs sued for a declaration that the said suspension was ultra vires and invalid.

The defendant also raised a preliminary point that the High Court had no jurisdiction to adjudicate on the matter by declaration and that it could only be done by certiorari. It appears that the plaintiffs discovered the position of the lack of authority of the port manager 2½ years after the said

A suspension, long after the time limit for applying for certiorari. The Court of Appeal unanimously held that the court had jurisdiction to grant a declaration, overruling the preliminary objection or point. Lord Denning said at p 1009: 'If the tribunal does not observe the law, what is to be done? The remedy by certiorari is hedged round by limitation and may not be available. Why then should not the court intervene by declaration and injunction?'

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The next is *Vine v National Dock Labour Board* [1957] 2 WLR 106, in which the plaintiff claimed for a declaration that his dismissal was void, ultra vires and illegal. A preliminary point from the defendant that the claim was incompetent and the only remedy was by certiorari was raised and dismissed. The House of Lords upheld the decision and held that the court had jurisdiction to grant the declaration.

C

Yet another is the case of *Pyx Granite*. Pyx claimed declarations in court that certain ministerial decisions were invalid in regard to their proposed development of their land. The Minister raised the objection that the court had no jurisdiction to grant a declaration asked for, on the ground that Pyx should have applied to the local authority to determine the proposed development under s 17 of the Town and Country Planning Act 1947. It was held that the provision of an alternative method of having the question determined did not preclude the court from granting declaration. Viscount Simonds made, in the course of delivering judgment, the dictum cited earlier. In the same case, Lord Goddard, who dealt with the argument advanced that if there was a remedy in the High Court, it must be by way of certiorari and not by declaration, had this to say at p 290:

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> I know of no authority for saying that if an order or decision can be attacked by certiorari, the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive.

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In passing, also in order to lay any possible spectre of any future contention of per incuriam against the present decision of this court for not mentioning the case of *O'Reilly v Mackman* [1982] 3 All ER 1124 which held the litigant in that case to a remedy of certiorari and not allowing the remedy of declaration, I will say a few words about this case.

G

Of course, it was feared that the remedy of declaration would virtually destroy the remedy of certiorari by replacing the latter and this, inter alia, led in 1977 to the law reform as embodied in O 53 of the Rules of Supreme Court of England which is different from our own O 53 of the RHC. Order 53 of England brought ten main changes to the earlier O 53, according to the White Book of 1979 at p 842; please see the changes set out there. The House of Lord's decision of *O'Reilly v Mackman*, in interpreting such changes brought about by the law reform has, according to the guru of administrative law Prof Wade in *Administrative Law* (6th Ed) at p 678, caused 'great uncertainty' and 'a serious setback for administrative law'. The decision was expressly not followed, for obvious reasons, in our courts, eg in *Sugumar*'s case and it was also not followed by the Court of Appeal of Singapore. The decision is not relevant to us and need not be

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I

discussed further, based as it was on the law reform which we have, with all deliberateness, not adopted in our RHC.

I would like to make a general observation before I end this judgment of mine, ie that a claim for a declaration is a very efficient remedy for an aggrieved citizen against ultra vires actions of all public authorities or governmental bodies. It has no coercive force by itself, inter alia, so that no such governmental body need feel the threat of such force. Thus, if a person's rights are affected by an order from such a public authority, he can sue for a declaration of the impropriety of the said order and if he succeeds, he can ignore the said order with impunity; see *Dyson v Attorney General* [1911] 1 KB 410; or if a government servant categorized under art 132 of the Federal Constitution is dismissed from his post, he can claim a declaration that he still holds it. See *Surinder Singh Kanda v Government of Federation of Malaya* [1962] MLJ 169.

If the private citizen was not to be allowed to circumvent the limitations of time for applying, etc of the certiorari by claiming for declaration instead, it would not be difficult to imagine how many such citizens could be, due to lack of expertise in the law of certiorari, barred from seeking justice and the court would have failed to live up to the image the public has, of being an institution of the people to serve the people in the interest of justice.

Since the preliminary point or objection related to jurisdiction of the court, ie that the High Court in the insant case had no right to entertain the plaintiff's claim for declaration, the Court of Appeal having based itself solely on *Healey*'s case, no doubt by relying on the submission of learned counsel for the defendants in the High Court, the nature of the preliminary point or objection coupled with the absence of any effort of the said counsel to make any other submission or any other point which the said counsel might rely and also that the instant case was tried and heard on the merits in the ordinary way with High Court, we conclude that this question or preliminary objection was the only question meant by the parties to be heard by the Court of Appeal. Any proposal for a hearing de novo before the Court of Appeal would be, therefore, out of place.

I for myself would therefore allow the appeal with costs here and the courts below; setting aside the order of the Court of Appeal dated 11 October 1996 and restoring the order of High Court dated 20 July 1994. The deposit in court is to be refunded to the appellant.

Zakaria Yatim FCJ: I had the privilege of reading the draft judgment of the learned President of the Court of Appeal and the draft judgment of my learned brother Peh Swee Chin FCJ. I have nothing more to add and I concur in both judgments.

Appeal allowed.

Reported by Loo Lai Mee